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No. 94-281

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

W.R. GRACE AND COMPANY-CONN.,

Petitioner,

v.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATED QUESTIONS PRESENTED

For ten years, Petitioner W.R. Grace unnecessarily added asbestos to its spray fireproofing product until pressure from health authorities forced Grace to remove the asbestos. Even after it had developed its non-asbestos product, Grace sold the asbestos product for the State Farm Corporate Headquarters. Grace failed adequately to test its product before sale and failed to warn about the asbestos. The jury in this Illinois diversity case found Grace negligent (which Grace has not appealed). At Grace's request, the trial court submitted to the jury a uniquely worded special question that did not accurately reflect the requirements of the Illinois Construction Statute of Repose. On post-trial motions, Grace recognized the defect in the special question and asked for a new trial at which a revised question could be asked. After a new trial was denied, Grace did not appeal that denial. Instead, it appealed the concurrent denial of its motion for judgment, relying on the jury's answer to the defective special question. The Seventh Circuit affirmed in an opinion that also contains two independent state law grounds for affirming the judgment against Grace. Accordingly, the questions legitimately raised by the Petition are:

1. Are a party's Seventh Amendment rights violated when the party is found negligent and does not appeal that finding, but instead argues that the answer to a defectively worded special question addressing one of its defenses entitles it to judgment even though it recognized the defect in the question below, sought a new trial on that ground, and then abandoned its new trial motion on appeal?

RESTATED QUESTIONS PRESENTED – Continued

2. Does an appellate court violate a party's Fifth or Fourteenth Amendment equal protection or due process guarantees when it construes an Illinois Construction Statute of Repose precisely as the Illinois state and federal courts have construed it?

3. When an appellate court relies on independent state law grounds for affirming a judgment, is a party entitled to Supreme Court review based on a purported constitutional defect in a separate ground for affirmance?

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

The Petition correctly identifies the parties.

State Farm Mutual Automobile Insurance Company does not have a parent company or any subsidiaries that are not wholly owned.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that the Court deny the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

STATEMENT OF THE CASE

I. BACKGROUND

In 1963 Grace acquired the Zonolite Company, including the right to make and sell Zonolite's "Mono-Kote" fireproofing. [Tr. 4508:2-8; 6556:4-6]. Mono-Kote consisted of a dry mixture of vermiculite, gypsum, and asbestos packed in 50

pound bags. [Tr. 674:19-23; 4540:21-23]. As sold by Grace, dry Mono-Kote powder was useless as fireproofing. [Tr. 5374:2-5]. At the job site, a fireproofing contractor had to mix the powder with water. This induced a chemical reaction which enabled the product to adhere when sprayed to structural steel. [Tr. 701:8-14; 4567:9-16; 4568:5-22; 5067:21-22]. Mono-Kote was a stock product sold throughout the country from various Grace plants. [Tr. 1099:10-14; 1102:22-1103:1; 5376:24-5377:16]. W.R. Grace did not install Mono-Kote [Tr. 994:17-21; 5373:3-7], license applicators to install Mono-Kote [Tr. 994:22-25], or provide any equipment to contractors who installed Mono-Kote [Tr. 5375:1-11].

Asbestos was unnecessary in Mono-Kote. The function of asbestos in Mono-Kote was primarily a "yield increasing additive." [Pl's. Ex. G-93 at 7]. As a result of pressure from public health authorities, Grace removed the asbestos from Mono-Kote in 1970 and replaced it with shredded paper fiber, often consisting of shredded newspaper. [Pl's. Ex. G-117.3092]. By the time Mono-Kote spraying began at State Farm's Corporate Headquarters in May 1971, Grace was selling the non-asbestos Mono-Kote ("MK-4") elsewhere. [Pl's. Ex. G-102]. MK-4 had all the necessary ratings for the State Farm Headquarters job as the asbestos Mono-Kote ("MK-3") but was not shipped there when the job began in May 1971. [Tr. 3226:10-14; 4725:7-10; Pl's. Ex. 1108]. Over 6,000 bags of asbestos MK-3 were sold for the job before Grace started shipping MK-4 there in August 1971. [Tr. 818:6-9]. Grace urged its sales managers "to maintain your areas with MK-3 as long as possible." [Pl's. Ex. G-96.4]. In the words of a Grace officer, "we must not get caught with dead inventory of asbestos." [Tr. 636:11-13]. Even where non-asbestos Mono-Kote had been approved, Grace officials were "dragging our

feet in making the change and are only doing it when our arm is twisted." [Tr. 4966:12-14; Pl's. Ex. G-104.3 at 5].

State Farm's architect prepared specifications for construction of State Farm's Corporate Headquarters and two regional offices. There was no evidence of any contact between any Grace representative and the architect in connection with preparation of the construction documents. The corporate witnesses called by Grace admitted no involvement in the design of the buildings. [Tr. 1047:11-21; 4549:6-9; 5222:16-20; 6167:24-6168:1]. Grace had no contract to construct, supervise, or take part in "any aspect of the construction" of the Corporate Headquarters. [Tr. 5372:14-5373:25]. The architects and contractors involved in the job held regular construction progress meetings that recorded in minute detail the participation of all entities involved. [Tr. 3105:4-15]. No Grace representative attended any of these construction progress meetings. [A-21-22].[1] Only one Grace employee visited the Headquarters project before August 1971 – the date when Grace claimed it had made the changeover to MK-4. [A-22]. No Grace representative ever visited the other two job sites. [A-22 n.5].

II. THE TRIAL

A. State Farm's Negligence Allegations and Evidence

In its opening statement, State Farm identified three specific allegations of negligence against Grace as the manufacturer of Mono-Kote: (1) unnecessary use of asbestos; (2) no warning on Mono-Kote packaging or literature; and (3)

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[1] The district court's Order and the Seventh Circuit Opinion are attached to Grace's Petition and are referred to here as "[A-___]."

inadequate testing of Mono-Kote before sale. [Tr. 19:25-20:1; 28:17-20; 30:15-20]. During trial, State Farm presented extensive evidence supporting its three allegations of manufacturer negligence. Concerning the unnecessary use of asbestos, State Farm showed *inter alia* that asbestos in Mono-Kote was primarily a "yield increasing additive" [Pl's. Ex. G-93 at 7 ¶ III] and that when Grace removed the asbestos from Mono-Kote under pressure from public health authorities in the East, it substituted shredded newspaper and sold the non-asbestos product where asbestos was under attack by health authorities [Tr. 4946:22-4947:7].

Concerning the lack of warning on product packaging or literature, State Farm presented evidence of Grace's knowledge of the hazards of asbestos: from reports as early as 1964 that the dangers from asbestos fibers "do not respect job classifications" [Tr. 538:18-540:3; 4892:7-4894:24]; from the work of leading asbestos researchers in the mid-1960s showing asbestos disease from "limited and intermittent" asbestos exposure [Tr. 4905:7-4906:21]; and from internal Grace correspondence concerning the advisability of a warning on asbestos-containing products. [Pl's. Ex. G-55]. Grace conceded it did not warn, but claimed there was nothing to warn about. [Tr. 581:3-15; 6818:9-10].

Concerning the inadequate testing claim, State Farm showed that Grace had done no testing for asbestos fiber release in buildings under such foreseeable conditions as office remodeling, cleaning, or demolition, even though Grace's Research Department had advised in 1970 that Grace should do tests of this type. [Tr. 5072:17-5083:5; Pl's. Ex. G-93(14)].

In its closing argument, State Farm reiterated the same three manufacturer's deficiencies – unnecessary asbestos, failure to warn, and inadequate testing – as the basis for its negligence claim against Grace as Mono-Kote's manufacturer. [Tr. 6699, 6701, 6705].

B. The Special Question

After the close of all liability evidence, and prior to jury instructions, State Farm filed a motion to strike the following special jury question requested by Grace:

> Did W.R. Grace provide design, planning, supervision, observation or management of construction services related to the installation of fireproofing to State Farm Mutual Automobile Insurance Company in addition to supplying bags of Mono-Kote 3 and Mono-Kote 4 fireproofing?

Mot. to Strike Special Question No. 2 of the Ct.'s Verdict Form (filed May 7, 1993). State Farm pointed out that construction of the Statute was a legal matter for the court in light of the record, case law, and legislative history, and that the legislature intended the statutory terms as words of art to describe the activities of those who assume responsibility for some facet of the construction. State Farm showed that the question, as interpreted by a lay juror, would require a "yes" answer even if a Grace representative had simply "observed" the job during his lunch break, even though Grace was not exercising any of the construction responsibilities the legislature intended to protect in the Statute. Grace did not ask the court to rephrase the question.

State Farm reiterated its objection to the special question before the case was submitted to the jury. [Tr. 6920:19-22]. In

response, the district court stated that the special question would not control its legal decision on the applicability of the Statute, but might be of some assistance. [Tr. 6921:13-17]. When the jury returned its verdict on May 11, 1993, finding Grace negligent, it also answered "yes" to the special question. Following the verdict on the damages phase, Grace filed motions for judgment and for a new trial, listing numerous alleged trial errors. Acknowledging the potential defect in the special question language, Grace sought *inter alia* a new trial at which a proper question could be asked.

III. THE DISTRICT COURT RULINGS ON THE CONSTRUCTION STATUTE OF REPOSE

The district court denied all of Grace's motions in a comprehensive opinion. [A-10-39]. Addressing the Construction Statute of Repose for the fifth time, the district court extensively reviewed the law. It noted the Illinois Supreme Court rule that the legislature could constitutionally classify "construction activities separately from other activities." [A-18]. In deciding what types of activities were protected by the Statute, the district court followed the "activity analysis" adopted in prior Seventh Circuit opinions. *See, e.g., Herriott v. Allied Signal, Inc.*, 998 F.2d 487 (7th Cir. 1993); *Witham v. Whiting Corp.*, 975 F.2d 1342 (7th Cir. 1992). This analysis requires a defendant seeking protection of the Statute of Repose to show either substantial participation at the job site or design of a custom made product. [A-20-21]. The district court found that "Grace did not 'custom design' and 'install' the Monokote, nor 'substantially participate' in the construction of State Farm's buildings." [A-21]. It noted that Grace sold a stock product that had to be mixed and installed by an

independent contractor using the contractor's own equipment; that "W.R. Grace's involvement in the construction process was minimal"; that no Grace representative ever attended any State Farm construction meeting; and that "[a]t best, W.R. Grace representatives visited the job on a few isolated occasions." [A-21-22].

The court also concluded that State Farm had sued Grace for negligence in "its manufacturing-related activities, rather than its construction-related activities." [A-22-23]. It reviewed a number of Illinois cases holding that the Construction Statute of Repose protects a defendant only when the defendant's liability arises from activities enumerated in the Statute. [A-23-24]. The court found that even if Grace did perform some minuscule activities at the job site, such activities were not the focus of the negligence claim. [A-22]. In light of its ruling that Grace's construction activities were neither substantial nor the focus of State Farm's negligence claim, the court ruled that the special question concerning Grace's construction "services" was not controlling. Accordingly, the court denied Grace's motion. [A-25].

IV. THE COURT OF APPEALS OPINION

On appeal, Grace did not challenge the negligence verdict or the denial of its motion for a new trial. Rather, it sought judgment on the basis of the answer to the defectively worded special question. A Seventh Circuit Panel, with Chief Judge Richard Posner presiding, unanimously affirmed. It held that Grace was not covered by the Illinois Construction Statute of Repose because the activities in which Grace engaged, "in relation to the Mono-Kote 3 used in the construction of State Farm's three buildings are not reasonably

interpreted as design, supervision, observation, planning, etc." [A-4]. It noted that Grace did not spray Mono-Kote, but merely supplied bags of fireproofing powder with instructions and sales literature. It recognized the defective special question as a "red herring" that improperly embellished the Statute's language with an overly broad inquiry as to "services" (a term not in the Statute) and expanded the inquiry to include non-asbestos Mono-Kote (a product not at issue in the case). [A-3]. The Panel agreed with the district court that it was not bound by the defective question in carrying out its duty to decide the applicability of the Construction Statute of Repose.

The Appellate Panel also found that even if Grace's activities were covered by the Statute, Grace would still lose on an independent state law ground because State Farm's negligence claim was not based on Grace's construction activities, but on "the design of the Mono-Kote (to include asbestos), the failure to test the product, and the failure to warn about it." [A-5]. Under Illinois law, only the construction activities enumerated in the Statute are entitled to immunity. [A-5]. Grace had conceded that the Statute protects only those construction activities. [A-5].

Finally, the Court held that Grace would lose on a third independent state law ground – the bagged Mono-Kote that Grace sold was not an "improvement to real property" under Illinois law as required for statutory protection. [A-6].

REASONS FOR DENYING THE WRIT

I. THE PETITION IS FRIVOLOUS

For over five years, State Farm has been litigating to recover its asbestos abatement costs from Grace. After a trial

spread over six months, a series of post trial motions (all denied), full appellate review (unanimously affirming the district court), and a petition for rehearing (denied), Grace filed this petition. It has not escaped commentators' notice that "many frivolous petitions are filed to delay the start of a jail sentence or the payment of damages." Stewart A. Baker, *A Practical Guide to Certiorari*, 33 Cath. U. L. Rev. 611, 630 (1984). Grace is not worried about jail. But lately it has begun a practice of seeking certiorari in asbestos property damage cases, using the stock argument that its Seventh Amendment rights have somehow been violated below. A comparison of the instant petition with the pending petition in *W.R. Grace & Co. v. MDU Resources Group*, 63 U.S.L.W. 3009 (U.S. June 22, 1994) (No. 93-2058), will show that sections of this petition were copied almost verbatim from that petition. *Compare MDU* Petition at 13-15 *with* Petition at 13-15.

This case presents no conflict among the circuits or legitimate federal constitutional issue for review. It is a diversity case decided under Illinois law. Grace's complaint arises from a uniquely-worded special question that Grace requested the jury be given. It is certain that Grace will not request the same question in any future Illinois case after both courts below have agreed on its inadequacy. Thus, the issue presented here will never arise again. As has been noted, "an issue that arises once is almost by definition one the Court need not hear." Baker, *supra* at 612. Moreover, the purported constitutional issues are of interest only to the parties, not the public. There is simply no reason, let alone a compelling one, to grant the petition.

II. THE PETITION PRESENTS NO LEGITIMATE SEVENTH AMENDMENT ISSUE

A. No Seventh Amendment Issue Is Presented When a Court Refuses to be Bound by the Answer to a Defective Special Question In Carrying Out Its Legal Duty to Interpret a Statute

In an attempt to manufacture a justification for requesting a writ of certiorari, Grace claims that its Seventh Amendment jury trial rights were violated when the courts below did not enter judgment for it on the basis of the jury's answer to the Construction Statute of Repose special question. As the Seventh Circuit correctly noted in its opinion, the question was improperly worded. [A-3]. It did not ask the jury to answer a factual inquiry from the Statute. Rather, it misleadingly asked whether Grace had provided any construction-related "services" – a term not in the Statute – and related those "services" to both the asbestos and non-asbestos Mono-Kotes even though non-asbestos Mono-Kote was not at issue. [A-3]. Grace requested the special question. [A-24]. State Farm objected below precisely because it was so ambiguously worded as to be meaningless. As phrased, a company providing the lunch wagon – surely a "construction service" for the workers – would be protected by it. The Seventh Amendment is not implicated when a court refuses to follow a meaningless jury response.

Grace does not dispute that under Illinois law, interpretation of the Illinois Statute of Repose was a question of law for the court, *see* [A-25]; *St. Louis v. Rockwell Graphic Sys., Inc.*, 605 N.E.2d 555, 556 (Ill. 1992) (application of the Illinois Construction Statute of Repose is an issue of law). Both courts below correctly concluded they were not bound by a defectively worded special question that did not assist them in

deciding the legal issue of the Statute's applicability. [A-25; A-3].

B. Grace Has Tried to Manufacture a Seventh Amendment Argument Out of its Own Failure to Cure the Defect in the Special Question

This Court does not grant certiorari to relieve parties of their litigation errors. It is fundamental that "special verdict questions must accurately present the issues in the case so as not to confuse or mislead the jury." *U.S. Fire Ins. Co. v. Pressed Steel Tank Co.*, 852 F.2d 313, 316 (7th Cir. 1988). The special question was submitted at Grace's request. [A-24]. When State Farm objected that it was overbroad and ambiguous, Grace remained silent and did not seek to have it rephrased. [Tr. 6920:19-6921:25]. In its post-trial motions, Grace realized its error:

> If this Court finds that the jury finding is inadequate to dismiss State Farm's claims as untimely under the statute of repose, then Grace would respectfully request a new trial at which the language specifically required by this Court could be submitted to the jury.[2]

The district court was entirely justified in rejecting this new trial request, since Grace waited until *after* the jury was discharged to request correction of the special question language.

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[2] W.R. Grace & Co.'s Mem. in Supp. Mot. for J. after Trial and Alternatively, a New Trial, Pursuant to F.R.C.P. 50 and 59 at 2 (Sept. 3, 1993).

On appeal, Grace realized that it had waived its chance to have the question correctly worded and abandoned its new trial request. It sought instead an appellate reversal based on the special question. [A-3]. In this petition, Grace is attempting to take advantage of its double default in failing to request the correct language at trial and then failing to appeal the denial of its motion for a new trial by now claiming that its Seventh Amendment rights were violated when the Panel failed to honor the defective special question. There is no legitimate Seventh Amendment issue for this Court to hear.

III. NO EQUAL PROTECTION OR DUE PROCESS ISSUE IS PRESENTED WHEN THE COURTS BELOW FOLLOWED A LONG LINE OF ILLINOIS DECISIONS AND CONCLUDED THAT GRACE DID NOT MEET THE ILLINOIS TEST FOR PROTECTION UNDER THE CONSTRUCTION STATUTE OF REPOSE

As with its Seventh Amendment argument, Grace attempts to manufacture an equal protection and due process argument by claiming that the courts below unconstitutionally denied it the protection of the Construction Statute of Repose based on its status as a manufacturer. [Pet. at 26]. The Record speaks otherwise. The Appellate Court emphasized that its decision was not based on Grace's status as a manufacturer, but on the fact that it did not meet the Statute's requirements in terms of the activities protected:

> Grace . . . argu[es] that the fact that it is a manufacturer rather than a designer, builder, etc. does not exclude it from the statute's protection. That is true but the activities in which it engaged in relation to the Mono-Kote 3 used in the construction of State

> Farm's three buildings are not reasonably interpreted as design, supervision, observation, planning, etc.

[A-4]. The Panel went on to analyze the minimal nature of Grace's construction activities including the fact that the "few visits" Grace employees made to the job site were primarily after the asbestos product had been applied, that Grace did not supervise any spraying, and that the standard instructions and sales literature it provided were nothing more than any manufacturer would do. [A-3-4].

The Seventh Circuit's opinion is consistent with an unbroken line of Illinois state and federal decisions requiring a manufacturer seeking protection under the Construction Statute of Repose to show "substantial" construction activity either at the job site or in off-site custom design or construction activities. *Herriott v. Allied-Signal, Inc.*, 801 F. Supp. 52 (N.D. Ill. 1992), *aff'd*, 998 F.2d 487 (7th Cir. 1993); *Hausman v. Monarch Mach. Tool Co.*, 997 F.2d 351 (7th Cir. 1993); *Witham v. Whiting Corp.*, 975 F.2d 1342 (7th Cir. 1992); *Heider v. W.R. Grace & Co.-Conn.*, 815 F. Supp. 1137 (N.D. Ill. 1993); *Landry v. Keene Corp.*, 811 F. Supp. 367 (N.D. Ill. 1993); *see also People v. Asbestospray Corp.*, 616 N.E.2d 652 (Ill. App. Ct.) (asbestos fireproofing manufacturer not protected by Construction Statute of Repose), *appeal denied*, 622 N.E.2d 1212 (Ill. 1993). Grace never challenged the compelling statistic that the hundreds of pages of Weekly Construction Progress Minutes, which recorded all design and construction decisions during the 1,277 day Headquarters' construction project, never mentioned any involvement by Grace. *See* [A-21-22]. Nevertheless, Grace now argues frivolously that it was denied the protection of the Construction Statute of Repose based on its "status" as a manufacturer – a

patently incorrect assertion. There is simply no due process or equal protection question presented when the face of the appellate opinion shows that the alleged discriminatory classification never occurred.

IV. A CONSTITUTIONAL DECISION ON THE SPECIAL QUESTION WOULD BE MERELY ADVISORY BECAUSE INDEPENDENT STATE LAW GROUNDS EXIST FOR AFFIRMANCE IN THE SEVENTH CIRCUIT'S ADDITIONAL HOLDINGS THAT GRACE DID NOT MEET THE OTHER ILLINOIS CRITERIA FOR APPLICATION OF THE CONSTRUCTION STATUTE OF REPOSE

This Court does not sit to render advisory opinions on constitutional issues. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). Even if Grace were right and the courts below should have held that Grace did acts enumerated in the Construction Statute of Repose, Grace would still not be entitled to reversal. Illinois has a tripartite test for immunity under the Construction Statute of Repose. First, a defendant's activities must be covered by the Statute. Second, plaintiff's claims must arise out of the covered activities. Third, the activities must be undertaken with respect to an "improvement to real property." The Seventh Circuit noted that Grace would also lose on the latter two issues. [A-5-6].

A. The Seventh Circuit Decision Contains the Independent State Law Ground for Affirmance that State Farm's Negligence Claims did not Arise Out of any Construction Activities of Grace

After holding that Grace's activities were not the type the Statute protected, the Panel below correctly held that Grace

was not covered by the Statute for the additional reason that State Farm's claims did not arise from any Grace activity covered by the Statute:

> Even if all this is wrong and the printed brochure made Grace a designer or builder of State Farm's buildings, Grace would still lose. Its negligence had nothing to do with the installation or application of the Mono-Kote. . . . The problem was in the design of the Mono-Kote (to include asbestos), the failure to test the product, and the failure to warn about it. These negligent acts or omissions being remote from building construction were not the sort of activities that the statute was intended to shield from late-filed products liability suits . . . .

[A-5]. The Panel's conclusion is supported by the numerous Illinois decisions reflected in the district court opinion. The Construction Statute of Repose does not operate against claims not based on the enumerated statutory activities. [A-22-24]; *see also Estate of Herrington v. County of Woodford*, 620 N.E.2d 463 (Ill. App. Ct. 1993), *appeal denied*, 631 N.E.2d 707 (Ill. 1994); *Prochnow v. El Paso Golf Club, Inc.*, 625 N.E.2d 769 (Ill. App. Ct. 1993), *appeal denied*, 633 N.E.2d 14 (Ill. 1994).

State Farm prosecuted its negligence claim based on Grace's mass marketing negligence in using unnecessary asbestos in the product, failing to warn, and failing to test before sale. *See* [A-22; A-4]. The jury returned a general negligence verdict, not specifying which of the allegations of negligence the verdict was based upon. As such, the negligence verdict must be upheld if there is any basis to support it. *Nobles v. White County*, 973 F.2d 544, 548 (7th Cir. 1992). Grace's argument in the petition that the negligence verdict might have been based on its sporadic construction activity is

insufficient to reverse the verdict under Illinois law.[3] To carry its burden on the affirmative defense, Grace had to prove that State Farm's manufacturing-related negligence claims could not have been the basis for the verdict. *Trzcinski v. American Casualty Co.*, 953 F.2d 307, 313 (7th Cir. 1992).[4] When the jury returned its general negligence verdict in favor of State Farm, Grace did not seek to have the verdict clarified in any way. [A-11; Tr. 6941:21-6942:7; 6948:19-6949:1].

Accordingly, because State Farm prosecuted its negligence claim based on Grace's manufacturing activities, which were not protected under the Construction Statute of Repose, and the jury returned a general negligence verdict in favor of State Farm, Grace is not entitled under Illinois law to the Statute's protection. The Appellate Panel's additional basis for affirmance on this independent state law ground removes any reason for certiorari.

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[3] Grace's argument concerning inconsistency in the negligence and strict liability verdicts is groundless. Under Illinois law, negligence and strict liability are not coterminous. [A-26]; *Davis v. FMC Corp.*, 771 F.2d 224, 230 (7th Cir. 1985). Nor were the factual allegations of the claims identical. For instance, State Farm alleged that Grace's negligence included "failing to adequately test Mono-Kote" [Tr. 6890:5-6], while the strict liability claim included no failure to test aspect [Tr. 6887:1-10]. Nothing in the verdicts supports Grace's claim that the jury must have focused on Grace's construction activities in deciding the negligence claim.

[4] Grace misleadingly cites State Farm's closing argument to claim that State Farm sought negligence recovery based on Grace's construction activities. [Pet. at 7 n.4; 19]. Grace's transcript reference is from State Farm's introductory overview of the facts. [Tr. 6698]. State Farm thereafter applied the facts to each cause of action and did not argue the 1972 Grace visit to the job site as part of its negligence claim. Rather, it was argued only with respect to fraud. [Tr. 6731-2]. Under Illinois law, the Construction Statute of Repose does not apply to fraud. *See* Ill. Rev. Code § 13-214(e) (1992).

B. The Panel's Decision Also Contains the Independent State Law Ground for Affirmance that Grace's Activities were not Undertaken with Respect to an "Improvement to Real Property"

As a third part of its decision, the court below analyzed Illinois law and held that bagged Mono-Kote powder was not an improvement to real property – another requirement for application of the Construction Statute of Repose. Grace argues that the Seventh Circuit misapplied Illinois law in reaching its conclusion. [Pet. at 26-7]. Not only did the Seventh Circuit correctly apply Illinois law, but it is not this Court's function to review the Seventh Circuit's application of Illinois law. Grace never requested that the Seventh Circuit certify the Construction Statute of Repose issue to the Illinois Supreme Court, although it now contends "the federal appellate court should have certified the issue to the state's highest court." [Pet. at 29 n.19]. Grace should not be heard to complain that the Seventh Circuit did not do something that Grace never asked it to do.

Moreover, the Appellate Panel's conclusion that bagged fireproofing powder is not an "improvement to real property" under Illinois law is supported by Illinois decisions on the issue, *see, e.g., Landry v. Keene Corp.*, 811 F. Supp. 367 (N.D. Ill. 1993), as well as by another federal appellate opinion applying the "improvement to real property" test to a Statute of Repose that Grace argued below was "identical" to the Illinois Statute, *Corbally v. W.R. Grace & Co.*, 993 F.2d 492, 494 (5th Cir. 1993) (finding that when Grace delivered its product it "was still several steps removed from becoming an improvement"), *reh'g denied*, 999 F.2d 1581 (5th Cir. 1993). This additional independent state law ground for affirmance removes all reasons to consider granting the Petition.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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